PTO Form 1960 (Rev 9/2007)
OMB No. 0651-0050 (Exp. 07/31/2017)

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	85935569
LAW OFFICE ASSIGNED	LAW OFFICE 116
MARK SECTION (no change)	
ADDITIONAL STATEMENTS SECTION	
MISCELLANEOUS STATEMENT	The applicant provides the attached statement and evidence in response to the examining attorney's final refusal to register applicant's mark because the applied-for mark allegedly consists of or includes immoral or scandalous matter.
MISCELLANEOUS FILE NAME(S)	
ORIGINAL PDF FILE	mis-9765106254-20150309184319418572_._Left_Nut_Recon.pdf
CONVERTED PDF FILE(S) (6 pages)	\\TICRS\EXPORT16\IMAGEOUT16\859\355\85935569\xml10\RFR0002.JPG
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SIGNATURE SECTION	
RESPONSE SIGNATURE	/Peter E. Morgan/
SIGNATORY'S NAME	Peter E. Morgan
SIGNATORY'S POSITION	Attorney of record, Georgia bar member
SIGNATORY'S PHONE NUMBER	7704101555
DATE SIGNED	03/09/2015

AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	NO
FILING INFORMATION SECTION	
SUBMIT DATE	Mon Mar 09 18:52:53 EDT 2015
TEAS STAMP	USPTO/RFR-97.65.106.254-20150309185253060205-85935569-530cce1465d8358e5dc9baa24f6ecf173dc4f28d9f6cda2827b3991ee13119f67a-N/A-N/A-20150309184319418572

PTO Form 1960 (Rev 9/2007)
OMB No. 0651-0050 (Exp. 07/31/2017)

Request for Reconsideration after Final Action

To the Commissioner for Trademarks:

Application serial no. **85935569** has been amended as follows:

ADDITIONAL STATEMENTS
Miscellaneous Statement
The applicant provides the attached statement and evidence in response to the examining attorney's final refusal to register applicant's mark because the applied-for mark allegedly consists of or includes immoral or scandalous matter.

Original PDF file:
mis-9765106254-20150309184319418572_._Left_Nut_Recon.pdf
Converted PDF file(s) (6 pages)
Miscellaneous File1
Miscellaneous File2
Miscellaneous File3
Miscellaneous File4
Miscellaneous File5
Miscellaneous File6

SIGNATURE(S)
Request for Reconsideration Signature
Signature: /Peter E. Morgan/ Date: 03/09/2015
Signatory's Name: Peter E. Morgan
Signatory's Position: Attorney of record, Georgia bar member

Signatory's Phone Number: 7704101555

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is not filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 85935569
Internet Transmission Date: Mon Mar 09 18:52:53 EDT 2015
TEAS Stamp: USPTO/RFR-97.65.106.254-2015030918525306
0205-85935569-530cce1465d8358e5dc9baa24f
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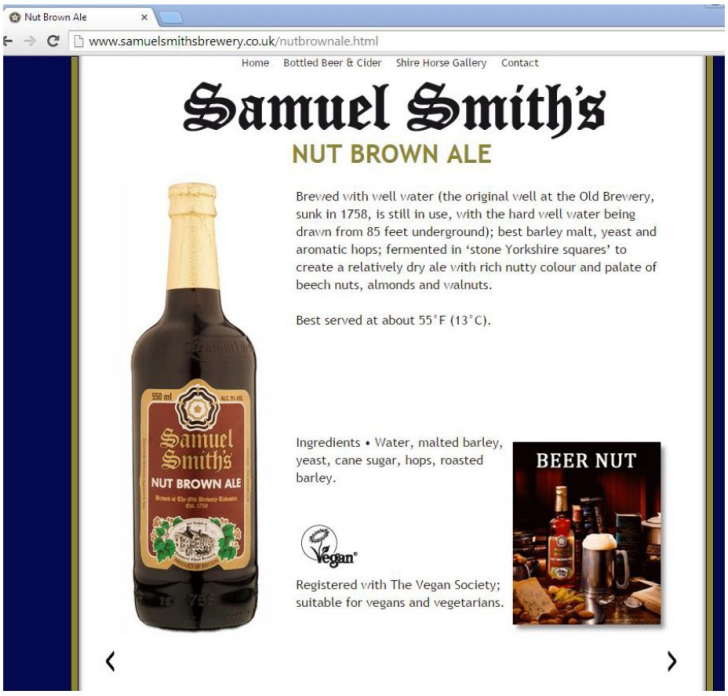
-N/A-N/A-20150309184319418572

The examining attorney has refused registration on the Principal Register because the examining attorney believes the mark to be immoral or scandalous. In order to sustain its objection the PTO must demonstrate that the mark is shocking to the sense of truth, decency, propriety, disgraceful, offensive, disreputable or calling for condemnation, as measured by a substantial composite of the general public toward the term in light of marketplaces for the goods and contemporary social attitudes. In re *Maverty Media Group Ltd*., 31 U.S.P.Q.2d 1923, 1925(Fed. Cir. 1994). The examining attorney has failed to meet this burden, and, accordingly, any doubts are to be resolved in favor of the applicant. In re *In Over Our Heads, Inc*., 16 U.S.P.Q.2d 1653 (T.T.A.B. 1990).

In support of her refusal, the examining attorney has indicated that dictionary evidence attached to Office Action No. 1 shows NUT to be a vulgar term and that the word NUT is scandalous because it is vulgar. The examining attorney cites *In re Boulevard's* holding that: "Dictionary definitions alone *may* be sufficient to show that a term is vulgar if multiple dictionaries, including at least one standard dictionary, uniformly indicate that the term's meaning is vulgar, *and the applicant's use of the term is clearly limited to that vulgar meaning*. [emphasis supplied]" See In re The Boulevard Entm't , Inc., 334 F.3d at 1341, 67 USPQ2d at 1478 (holding 1-800-JACK-OFF and JACK-OFF scandalous where all dictionary definitions of "jack-off" were considered vulgar). Thus, evidence from dictionaries is not *presumptively* sufficient but *may* be considered so if the above-stated conditions are met. These conditions were not met in the examining attorney's review of the present application. However, although the examining attorney notes that "[i]n this case, there is no evidence that the applicant uses NUT to mean anything other than the vulgar meaning," the examining attorney neglects the fact that "[t]he burden of proving that the proposed mark is unregistrable under 15 U.S.C. § 1052(a) rests on the PTO" and not with the applicant. *In re Fox*, 702 F.3d 633, 637 (Fed. Cir. 2012).

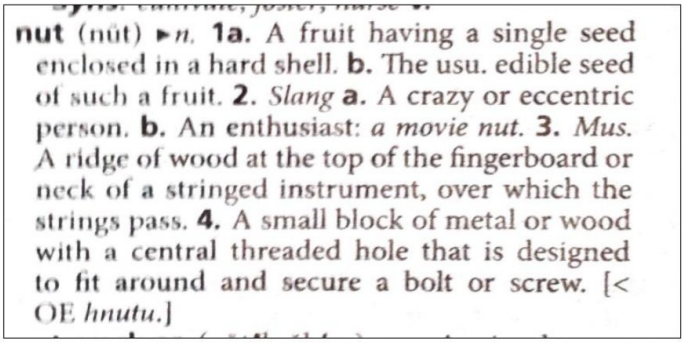
The applicant's proposed mark is to be used in connection with craft beer, which the applicant has already demonstrated often relates to or is suggestive of terms such as "nut," "nuts," and "nuttiness," not to mention alternative, progress, or eccentric lifestyle choices. The following website advertisement shows the widely distributed and famous imported English ale, "Samuel Smith's Nut Brown Ale." The ad demonstrates once more that "nut" is used as a descriptor for certain beer types, flavors, and colors, and the associated magazine, "Beer Nut," also advertised, demonstrates the common use of "nut" to mean "fanatic" or "connoisseur."



It is not possible for the examining attorney to make an *a priori* determination of vulgarity as required by *In re Boulevard*, which requires that "the applicant's use of the term [be] clearly *limited* to that vulgar meaning" as presented with "uniformity" in dictionaries. Moreover, since applicant's application in this case is a Section 1(b) application, the examining attorney can do no more than speculate as to the *multiplicity* of meanings that applicant may invoke. While the examining attorney, in her Final Office Action, cites *In re Fox* for the proposition that there is no requirement in Trademark Act Section 2(a) that a mark's vulgar meaning be the "only relevant meaning--or even the most relevant meaning," it is important to remember that the dictionary evidence cited in *In re Fox* presented no *non*-vulgar meaning of "cocksucker." *In re Fox*, 702 F.3d 633, 635, 105 USPQ2d 1247, 1248 (Fed. Cir. 2012). The alleged alternate meaning for that applicant could only be conjured by ignoring the commonplace, dictionary-defined unitary term "cocksucker" and considering the component words in an artificially separate context. In that case, the applicant tried to create a non-vulgar meaning in the product itself, but the dictionary evidence failed to support the non-vulgar meaning. In the present case, however, "Left" and "Nut" do not constitute a standard unitary term that has been artificially parsed. To the extent that the words relate to each other, they certainly do not rise to the level of a compound word such as "cocksucker." Whereas in both *Fox* and *Boulevard*, dictionary evidence was sufficient because of the singularity of the meaning of a vulgar term in the dictionary, this is not at all the case with "Left Nut."

In a number of dictionaries reviewed by the Applicant, the word "nut" was attributed no vulgar meaning whatsoever, despite the inclusion of a slang definition for "crazy person," and

there were no standard dictionaries that even contained the phrase "left nut." See *American Heritage Dictionary,* 5th Edition, 577.



nut (nŭt) ▸*n.* **1a.** A fruit having a single seed enclosed in a hard shell. **b.** The usu. edible seed of such a fruit. **2.** *Slang* **a.** A crazy or eccentric person. **b.** An enthusiast: *a movie nut.* **3.** *Mus.* A ridge of wood at the top of the fingerboard or neck of a stringed instrument, over which the strings pass. **4.** A small block of metal or wood with a central threaded hole that is designed to fit around and secure a bolt or screw. [< OE *hnutu.*]

Even the *Oxford American dictionary*, which is arguably one of the most comprehensive and highly regarded American English dictionaries, while it goes so far as to define terms such as, "WTF," does not define "left nut." The twin-word phrase "left nut" has apparently therefore not entered the language to the extent that it so recognizable as to warrant inclusion in a dictionary in the same manner as, say, "WTF," "Jack-Off," or "Cocksucker," the inclusion of which in dictionaries may arguably be taken to indicate their recognition by a substantial portion of the community.

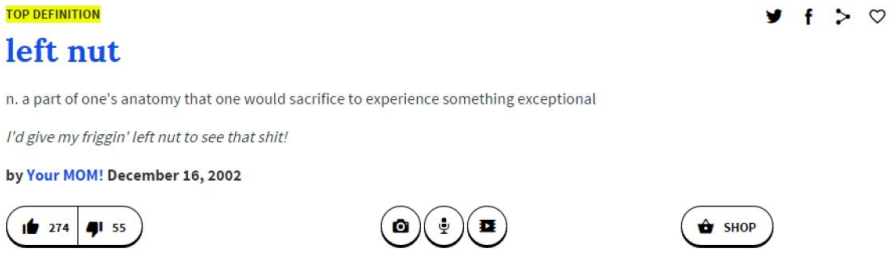
Moreover, the mere presence of a particular word as a component of a slang idiom, without more, does not definitively fix the meaning of that element. The examining attorney draws attention to the term "Sex rod," a term that the Board has noted, when the two constituent words are used in conjunction with one another, cannot but suggest the same meaning. *Boston Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581, 1588 (T.T.A.B. 2008). In the present case, however, "Left," unlike "sex" is largely descriptive, and so ambiguous at to fail to fix any particular meaning when yoked with "Nut" in the way that "sex" determines the meaning of "rod" when the two are paired. In fact, other definitions of "left nut" are not only possible but have been coined as follows:

(1) "a leftwing radical / see mainstream of the Demmocrat party [sic] / *Shutup you whiney leftnut mail bomber.*
(2) "a left wing screwball / anyone on the political left"
http://www.urbandictionary.com/define.php?term=left+nut (1:05 pm 2/17/15)

As such, each of the cases cited by the examining attorney is at least inconclusive if not entirely inapposite. Though the term "nut" is universally listed in dictionaries, it is not uniformly noted as having a "vulgar" meaning, and the meaning is arguably ambiguous in the present case, not only in reference to the above-referenced alternate definitions but also because the mark is not yet in use by the applicant, and the extent of its use has yet to be determined and demonstrated. As in the present instance, "[w]here the meaning of a proposed mark is ambiguous, mere dictionary evidence of a possible vulgar meaning may be insufficient to establish the vulgarity of the mark." *In re Fox*, 105 USPQ2d at 1248. Here, dictionary evidence does not support the contention "that the mark[ ] as used by [the applicant] in connection with

the [products] described in [the] application" invokes a vulgar meaning to a substantial composite of the general public" at 1341. Id at 635. Neither is it "one of the famous "seven dirty words" found by the Supreme Court to be generally "indecent." *See FCC v. Pacifica Found.,* 438 U.S. 726, 738–41, 751, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). *In re Fox*, 702 F.3d 633, 637 (Fed. Cir. 2012) Note 1.

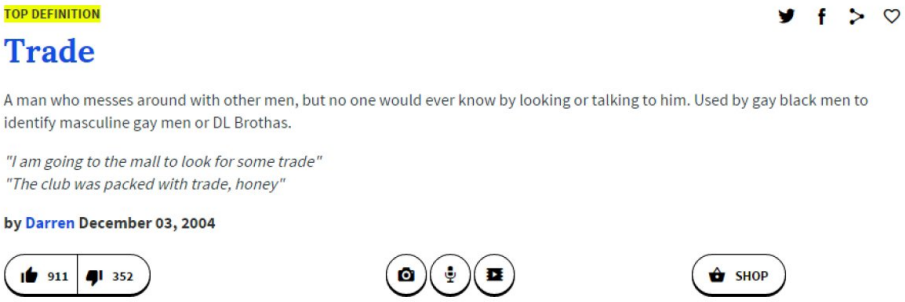
Not only is dictionary evidence scant and inconclusive in the present case, but the examining attorney's reliance on "evidence" from the so-called "*Urban Dictionary*" is similarly misplaced. *In re Star Belly Stitcher, Inc*. T.T.A.B., No. 85247730, 8/12/13 Note 3. T.T.A.B. has expressly recognized the unreliability of the "user-generated" content of UrbanDictionary.com. Id. This dictionary-in-name-only does not represent the "effort to distill the collective understanding of the community with respect to language" that initially justified the Court's notice of dictionary evidence. *In re Boulevard Entm't, Inc*., 334 F.3d 1336, 1340 (Fed. Cir. 2003). Recently, T.T.A.B., while not dismissing *Urban Dictionary* altogether, expressly stated that *Urban Dictionary* evidence is to be given limited consideration "given that anyone can submit or edit the definitions." *In re Star Belly Stitcher* at Note 3. Further, the T.T.A.B. recognized "that while a definition in Urban Dictionary may be indicative of what a term means to a composite of the general public, …[it is] less sure that it represents the meaning to a substantial composite, given that just one person can submit a proposed definition." Id. In fact, the definition relied upon by the examining attorney was reportedly submitted by "Your Mom," who submitted a total of two "definitions."



http://www.urbandictionary.com/define.php?term=left+nut

As the Board stated as far back as 1978, "One of a certain cast of mind may perhaps see evil wherever the eye may light or in whatever may fall on the ear. We are unwilling to assign base motives to an applicant who propounds a plausible explanation for a trademark." *In Re Leo Quan Inc.*, 200 U.S.P.Q. (BNA) ¶ 370 (P.T.O. Sept. 22, 1978). In *In Re Leo Quan,* the board dismissed as insignificant the "colloquialisms of a particular segment of the society of the age," in determining whether "BADASS" was registrable. The Court's description of inadequate evidence embodies the puerile activity represented by the Urban Dictionary, which is populated with crude definition after crude definition purely for the entertainment of individuals whose online pseudonyms give a clear glimpse into their mentality. Id. One has only to look up in the *Urban Dictionary* the separate terms "Trade," "Mark" and "Examiner" to be cured forever of foolhardy reliance on the "Urban Dictionary" as an indicator of a definition embraced by a substantial composite of the

population as well as the dubious wisdom of parsing a phrase or idiom into its separate parts to determine the meaning of any of its components in context:


TOP DEFINITION

Trade

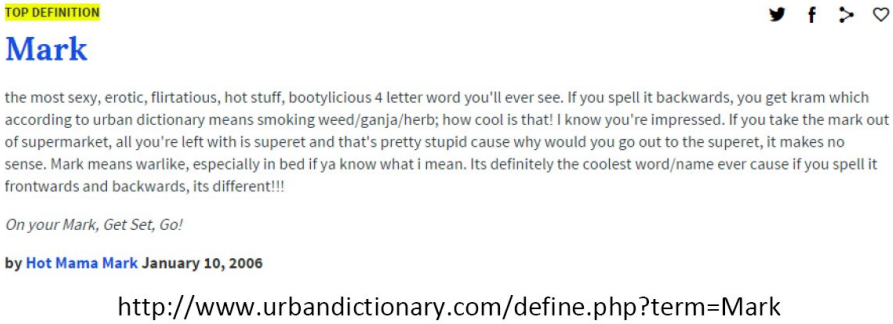
A man who messes around with other men, but no one would ever know by looking or talking to him. Used by gay black men to identify masculine gay men or DL Brothas.

"I am going to the mall to look for some trade"
"The club was packed with trade, honey"

by Darren December 03, 2004

911 352 SHOP

http://www.urbandictionary.com/define.php?term=Trade&utm_source=search-action


TOP DEFINITION

Mark

the most sexy, erotic, flirtatious, hot stuff, bootylicious 4 letter word you'll ever see. If you spell it backwards, you get kram which according to urban dictionary means smoking weed/ganja/herb; how cool is that! I know you're impressed. If you take the mark out of supermarket, all you're left with is superet and that's pretty stupid cause why would you go out to the superet, it makes no sense. Mark means warlike, especially in bed if ya know what i mean. Its definitely the coolest word/name ever cause if you spell it frontwards and backwards, its different!!!

On your Mark, Get Set, Go!

by Hot Mama Mark January 10, 2006

http://www.urbandictionary.com/define.php?term=Mark


TOP DEFINITION

examiner

a person who is sexually promiscuous; the term is offensive to society at large, and particularly to those in the Latin-American community.

He is such an examiner

by Heather Colburn January 10, 2007

2 7 SHOP

http://www.urbandictionary.com/define.php?term=examiner

In addition to the foregoing, the applicant would like to remind the examining attorney that while the *Boulevard* court dismissed the appellant's equal protection argument, it acknowledged that a claim would exist if "the agency acted pursuant to some impermissible or arbitrary standard." *In re Boulevard Entm't, Inc.*, 334 F.3d 1336, 1343 (Fed. Cir. 2003).

"Entrepreneurs… who plan to promote and to sell a new product under a fanciful mark, *should be able to rely on a search of the trademark registry* and their own knowledge of whether the mark has been used so that what may be substantial expenditures of money promoting the mark will not be wasted." *Natural Footwear Ltd. v. Hart, Schaffner & Marx,* 760 F.2d 1383, 1395, 225 USPQ 1104, 1111-12 (3d Cir.1985) (citing *Weiner King, Inc. v. The Wiener King Corp.,* 615 F.2d 512, 523-24, 204 USPQ 820, 830-31 (CCPA 1980)). Despite the principle that prior registrations are not binding upon the examining attorney or the Board, it is clear that an important purpose of the registry is to inform entrepreneurs as to what marks are likely registrable. While it is true that no determination is without some level of subjectivity, the many instances of humorous "nut" related marks to which the applicant has previously drawn the examining attorney's attention and which pervade the registry, not to mention the registration of such marks as "WTF" and "raging bitch" as marks for beer in particular, suggesting an consumer group that is tolerant of, even drawn to, "edgier" marks, indicate a standard that is not in keeping with the standard applied to applicant and further suggests the arbitrariness of the present refusal to register. The Board has acknowledged that the "guidelines are somewhat vague and that a determination that a mark is scandalous is necessarily a highly subjective one." *In re Over Our Heads Inc*., 16 USPQ2d 1653 (TTAB 1990) (Board resolved doubt regarding the scandalous nature of the mark MOONIES in favor of publication). And it is this that makes the approval of ambiguous applications all the more important. In light of this problem of subjectivity, the Board reversed a finding that 'BIG PECKER BRAND" was "a scandalous mark as applied to T-shirts" *In Re Hershey*, 6 U.S.P.Q.2d 1470 (P.T.O. Mar. 10, 1988), suggesting, it would seem, that, in the examining attorney's opinion, "left nut" is somehow less ambiguous, less open to multiple meanings, and more offensive than "big pecker." As *Mavety* reminds us, "we must be mindful of ever-changing social attitudes and sensitivities. Today's scandal can be tomorrow's vogue. Proof abounds in nearly every quarter…. *To appreciate the extreme changes in social mores over time, one need only glance at a historical survey of Board decisions regarding refusals to register marks containing particular words deemed scandalous.*" *Maverty* Note 18 [emphasis added].

In this application, Applicant does not seek to change the law, merely to register a distinctive brand that is both suggestive of its product and appealing to its target demographic. In light of the foregoing arguments and evidence showing that the present application should not be refused under existing precedent, and incorporating herein by reference all prior arguments and evidence presented in response to the examining attorney's office actions, applicant respectfully requests that the present refusal to register be withdrawn and its application be permitted to proceed to publication.